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# *Supreme Court of the United States*

OCTOBER TERM, A. D. 1940

## *No. 62 0*

LAURA S. K. SLOCUM, A. COHN and MERWIN M. HART,

*Petitioners,*

vs.

FIRST NATIONAL BANK OF CHICAGO, JOHN C. MEINERS and JOHN C. PARTRIDGE, individually and as members of a Bondholders' Protective Committee under a Deposit Agreement dated December 31, 1931, A. HARRIS, M. ROTHSCHILD, H. H. BAUM, SECURITY NATIONAL BANK OF SHEBOYGAN, WISCONSIN, as Trustee under the Last Will and Testament of Joachim Johann, and A. C. ALLYN & CO., a Delaware Corporation,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

## PETITIONERS' REPLY BRIEF

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## INDEX.


PAGE

THE "STATEMENT" IS INACCURATE ..... 1-2

THE "CONTENTIONS" ARE UNTENABLE ..... 3

THE "ARGUMENT" IS BUILT ON FALSE PREMISES ..... 3

I. The federal question was not waived by the appeal to the Appellate Court ..... 3

A. An appeal to the Supreme Court of Illinois can only be taken where the validity of a statute or the construction of the Constitution is involved and not from the denial of a right under the Constitution and therefore there was no waiver of the federal question ..... 3-5

B. The federal question was raised and the rule applicable for construction of constitutional questions is applicable here ..... 5-6

II. The order dismissing the complaint was improper and presents a federal question ..... 6-7


### TABLE OF CASES.


Colorado and Southern Railway Co. v. Blair, 214 N. Y. 497 ..... 6

Cooper v. Palais Royal Theatre, 320 Ill. 44 ..... 4

C. & O. R. Co. v. Mihas, 280 U. S. 102 ..... 5

Economy Dairy Co. v. Kerner, 371 Ill. 263 ..... 4

Home Ins. Co. v. Dick, 281 U. S. 397 ..... 5

Speakman v. Tatem, 45 N. J. Eq. 388 ..... 6


### OTHER AUTHORITIES CITED.


Bogert on Trusts and Trustees, Vol. 3, Sec. 593 ..... 6

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## PETITIONERS' REPLY BRIEF

### The "Statement" Is Inaccurate.

The statement that the "original proceedings" commenced by the "Security" Bank was a "class" suit is incorrect. In its *first* count (R. 5-6) it sought relief for *its own benefit to obtain a judgment of $12,723.75.* In

its "second" count it became a "class" representative and alleged that a "judgment has already been taken" and that "other suits are being threatened." The judgment creditor Slocum was not made a party and *was not let in as a party* (R. 66).

The "about face" of the representative of the "class suit" from a suit to *restrain the release* (R. 6-7) to a suit *to authorize the release* is said to be (p. 3) because of its "thorough examination" and as a "result of such examination." It is true that it made such explanation in its amended complaint for its "about face" but its allegations are not binding on the petitioners who challenged the truth thereof and who alleged that the "about face" was the result (R. 33) of a "secret deal" and because (R. 30) of the promise of a fee of $1,000 to its counsel and "other consideration." *These allegations stand admitted by the motion to dismiss* and the allegations of the "Security" Bank to which they refer (p. 3) *cannot be considered.*

The same "class" representative which alleged in the "original proceedings" that the Trustee failed to take action to "enforce the guarantee" (R. 6) and was (R. 7) then "informed" of the "facts" and *sought to restrain the cancellation of the guarantee* is the same "person" which later stated in the amended complaint that the advantages and benefits "of the proposed tender" (R. 7) will be lost unless the tender was accepted! It was the same tender which it assailed in the original proceeding (R. 7) and against which it sought "equitable" relief.

The First National Bank, as Trustee, which filed the answer in the class action asking for the construction of its "power" as quoted in their brief (p. 4) had previously become a party to the plan (R. 4) which provided for the cancellation of the guarantee, and acted as depositary thereunder (R. 37).

### The "Contentions" Are Untenable.

Respondents' contentions are (p. 8): (1) all constitutional questions have been waived, and (2) that petitioners were represented in the class action. We will show (1) that no construction of the constitutional question is involved and of course the doctrine of "waiver" is inapplicable to questions which never existed, and (2) that petitioners were not represented by the alleged "class" representative.

## THE "ARGUMENT" IS BUILT ON FALSE PREMISES.

### I.

### The federal question was not waived by the appeal to the Appellate Court.

The contention that this court is without jurisdiction to grant the writ because "all constitutional questions" were "waived" by the appeal to the Appellate Court is founded on the confusion between a *construction* of a "constitutional question" and a "Federal question."

#### A. An appeal to the Supreme Court of Illinois can only be taken where the validity of a statute or the construction of the Constitution is involved and not from the denial of a right under the Constitution and therefore there was no waiver of the federal question.

The contention that "all constitutional questions" were waived by the appeal to the Appellate Court and not to the Supreme Court, is based on their *failure to distinguish* between a *"construction"* of the Constitution which gave the Supreme Court of Illinois the exclusive jurisdiction on appeal, and a *"right"* under the

Constitution where the appeal can only be taken to the Appellate Court. This distinction was clearly made in *Cooper* v. *Palais Royal Theatre,* 320 Ill. 44. We quote the following:

> "In order to confer jurisdiction on this court to review a case on appeal direct from the circuit court on the ground that a constitutional question is involved, a *construction* of the constitution must be involved or the *validity* of a statute questioned. (Practice act, sec. 118; *People* v. *Cermak,* 317 Ill. 590.)" (Italics ours.)

The same principle is announced in *Economy Dairy Co.* v. *Kerner,* 371 Ill. 263, where the court says:

> "The mere assertion that a constitutional question is involved or that a constitutional right has been invaded is not sufficient, in the absence of other grounds, to confer jurisdiction, (*Hawkins* v. *Hawkins,* 350 Ill. 227,) as no duty rests upon the court to discover a basis on which jurisdiction to entertain the appeal can be sustained. (*City of Chicago* v. *Peterson,* 360 Ill. 177; *People* v. *Davies,* 350 *id.* 48; *Iles* v. *Heidenreich,* 271 *id.* 480; *People* v. *City of Chicago,* 238 *id.* 146.) A constitutional question is not presented, so as to give this court jurisdiction of a direct appeal, where a judgment or decree is assailed on the ground that its enforcement will deprive the person against whom enforcement is sought of some constitutional right. The question in such case is merely the validity of the judgment or decree. *O'Connor* v. *Rathje,* 368 Ill. 83; *De La Cour* v. *De La Cour,* 363 *id.* 545; *Genslinger* v. *New Illinois Athletic Club,* 332 *id.* 316; *Cooper* v. *Palais Royal Theatre Co. supra.*"

The present Illinois Civil Practice Act confers the jurisdiction of a direct appeal to the Supreme Court in cases in which "the *validity* of a Statute or a *construction* of the constitution is involved." (Chapter 110, Section 199 of the Civil Practice Act.) This court has

squarely held *that it has jurisdiction of an appeal taken to the Appellate Court.* This court said in the "St. Paul" case (279 U. S. 410) cited in our brief (p. 7):

> "The judgment is reviewable here. 'Wherever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach.' *Williams* v. *Bruffy,* 102 U. S. 248, 255. And see *Gregory* v. *McVeigh,* 23 Wall. 294, 306."

Jurisdiction was also sustained in *C. & O. R. Co.* v. *Mihas,* 280 U. S. 102; *Home Ins. Co.* v *Dick,* 281 U. S. 397. If it be true that an appeal to an Appellate Court waives every Federal question then the jurisdiction sustained in the foregoing cases could not have been sustained.

**B. The Federal question was raised and the rule applicable to construction of constitutional questions is applicable here.**

The contention (p. 13) that "failure to raise the constitutional question" constitutes "a waiver" is of course based on the same false premises that a *construction* of a *constitutional* question is synonymous with a *"right"* under the constitution. In stating the grounds for the jurisdiction invoked (p. 6) we stated that it was *invoked under "237b."* The cases on which they rely, apply to "237a," involving "validity" or "construction." They are inapplicable to "237b" involving a "right" under the constitution. We cited (p. 7) the *Cumberland* case (237 U. S. 447) on the point that a *defense of res adjudicata* based on a Federal decision *"presents a Federal question"* and *asserts* "a *right"* under Section 237b.

The *"Penn"* case (297 U. S. 447) on which they rely and which they quote (p. 13) deals with the "construc-

tion of the Federal Constitution." The same case held (p. 451) that under 237b the appeal to the Appellate Court conferred jurisdiction here for the issuance of the writ.

## II.

### The order dismissing the complaint was improper and presents a Federal question.

The contention (p. 15) that the decision in the *Hansberry* case is inapplicable here because the petitioners were represented by the plaintiff in the "original proceedings" is *fallacious*. How a *general* creditor who seeks a personal judgment in its first count (R. 5-6) can become a representative of one who was a judgment creditor is indeed a puzzle. How the same *general* creditor who seeks in its second count to restrain the enforcement of the judgment can become the representative of such judgment creditors is still a greater puzzle, but the argument that such *general* creditor may commence a "class" action to restrain a cancellation of a guaranty and later *about face and seek such cancellation* and thereby affect the rights of the judgment creditor is indeed *ridiculous*. The contention that the Successor Trustee represented the petitioners is equally unsound. The proposition that the Trustee represents the bondholders is applicable in cases where the Trustee *seeks to obtain property for the trust* estate, not where the Trustee *seeks to abandon trust property* or to release the trust estate from any lien. (*Colorado and Southern Railway Co.* v. *Blair,* 214 N. Y. 497; Bogert on Trusts and Trustees, Vol. 3, Section 593.)

In *Speakman* v. *Tatem,* 45 N. J. Eq. 388 (cited in 65 Corpus Juris, 901) the Court said:

> "In all cases where the suit is to take the trust fund out of the hands of the trustees, or where it

is for an account of the trust fund, being in fact a bill for the execution of the trust, *the cestuis que trust must all be parties.* Where the suit is merely to enable the trustees to get possession of the trust fund, the *cestuis que trust* may be omitted but *not where it relates to the execution of the trust."* (Italics ours.)

The decisions that bondholders are not indispensable parties where the Trustee and a committee are parties has no application here for the reason that in all such cases there was an *adversary* party to represent the class. Here, the plaintiff sought the *approval* of the action for the Committee and the Trustee was a party to the Committee's Plan (R. 37) and *every party known to them to oppose their scheme was omitted and not even let in when he sought to protect his rights.*

## CONCLUSION.

The main issues in the case were evaded by the respondents. They were in no position to justify the decree which deprived petitioner Slocum of her right to the enforcement of the judgment without making her a party. The defense is purely on technical points without merit. For the foregoing reasons we urge the issuance of the Writ.

Respectfully submitted,

MEYER ABRAMS,
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*Counsel for Petitioners.*

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## REPLY TO BRIEF OF A. C. ALLYN & COMPANY

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## REPLY TO BRIEF OF A. C. ALLYN & COMPANY

### FOREWORD.

After we forwarded to the Clerk of this Court petitioners' reply to the brief of the other respondents we were served with a copy of the brief of A. C. Allyn & Company (hereinafter referred to as "Allyn"), and this reply is limited to the additional points argued there.

## I.

### Jurisdictional Question.

Allyn states (p. 6) that its motion to dismiss was on several grounds, some of which went *to only parts of the complaint.* Under the Illinois Law the pleader must ask the appropriate relief. The pleader may not move to strike parts of a complaint and ask for the relief to dismiss a whole complaint (*Messick* v. *Mohr,* 292 Ill. App. 69, 77). Allyn did not ask in the prayer for relief to strike parts of the complaint but it asked "to dismiss" the *entire* complaint (R. 57). It did not obtain other relief to strike parts of the complaint but *it obtained relief to dismiss the entire complaint.* It now *confesses* (p. 13) that it was not entitled to a dismissal of the entire complaint on the two pleas of *res adjudicata,* yet it *obtained such relief.* On the one hand Allyn contends that the decision may be sustained on a "non-federal" question, and on the other hand it *concedes* (p. 10) *that the entire complaint could not have been dismissed on the motion to strike only parts of the complaint* and that the pleas of *res adjudicata* "could not constitute sufficient ground for the striking of the entire amended complaint and the dismissal of the entire action." It is petitioners who urged this point below (R. 100, 101). The Appellate Court held that it *"could,"* and *it did sustain the dismissal of the entire complaint.* This is what we seek to review. The Trustee sought the dismissal of the *entire* complaint on the pleas of *res-adjudicata* (R. 34 (1) and (2)), and it *obtained such relief.* The contention that the decision might have been based on a "non-federal" question disregards the decision which *sustained the motion to dismiss on the federal questions,* namely, the pleas of *res adjudicata.* Besides, the non-federal question must be "fair," "substantial"

and *not* "untenable." The alleged non-federal question that the complaint did not comply with Section 33 of the Civil Practice Act *was untenable* because of Rule 12 of the Illinois Supreme Court (*Kovar* v. *Bremer, et al.,* 281 Ill. App. 505, 509). The numerous citations on the point that where there is a "non-federal" question and a "federal" question the court will not take jurisdiction if the decision can be sustained on the non-federal question *hinges on the point whether the non-federal question can sustain the judgment.* The non-federal question must *not* be "unfounded" (*Enterprise Irrigation District* v. *Construction Co.,* 243 U. S. 157, 164). The non-federal question must be "fair" (*Ward* v. *Love County,* 253 U. S. 17, 22). They, *who admit that they were not entitled to a dismissal of the entire complaint* under their pleas of *res adjudicata* and who obtained such relief *cannot be heard to say* that the granting of their motion was on a non-federal question, to prevent a review here.

This court has held that it is its duty to examine the record to see if the non-federal question was "substantial" and "fair" and sufficient to support the judgment. For a discussion of the whole subject we refer to Robertson & Kirkham on Jurisdiction of Supreme Court, page 156, Section 89.

## II.

### The Cases Are Not Distinguishable.

The attempt (p. 10) to distinguish the *Cumberland* case (237 U. S. 447) on the ground that there the pleas were not sustained and here the pleas were sustained are devoid of merit. The case of *Postal Telephone Cable Co.* v. *Newport,* 247 U. S. 464, 475, presents a case where the plea of *res adjudicata* was *sustained,* and the court held that it *presented a Federal question under 237b.*

There, the point was raised that the decision might be based on a "non-federal" question. The court held that the decision which sustained a plea of *res adjudicata* based on a judgment to which the petitioner was not a party was "too clearly unfounded" to support the decision. The contention (p. 13) that the pleas of *res adjudicata* were raised only to certain causes of the complaint and not to the entire complaint is unsound for the reason that the court did not sustain the motion to strike part of the complaint *but sustained the motion to the entire complaint.*

We are not concerned now with the decision of the trial court but with the decision of the Appellate Court *which sustained these pleas to the entire complaint.* This is what we seek to review here. Besides, the motion of the trustee was to dismiss the entire complaint predicated on the pleas of *res adjudicata* (R. 34 (1) and (2)) and the trial court sustained (R. 57) "each and every motion" and this is what the decision affirmed.

All other points discussed in the Allyn brief are covered by the reply to the brief of the other respondents.

For the foregoing reasons we urge the issuance of the Writ.

Respectfully submitted,

MEYER ABRAMS and
LEO L. GINSBURG,
*Attorneys for Petitioners.*